STATE OF MICHIGAN

COURT OF APPEALS

WILKINSON CORPORATION,

Plaintiff-Appellant,

v

WOOD GROUP ESP, INC.,

Defendant-Appellee.

UNPUBLISHED
October 25, 2005

No. 262825
Lapeer Circuit Court
LC No. 03-032764-NP

Before: Talbot, P.J., and White and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting summary disposition to defendant. We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

This Court reviews de novo a trial court's decision granting summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

The circuit court concluded that a 2002 agreement between the parties constituted a novation that precluded plaintiff from pursuing his warranty claims under a 2001 agreement. The circuit court held, and the parties agree, that novation requires four elements:

> A novation requires: (1) parties capable of contracting; (2) a valid obligation to be displaced; (3) consent of all parties to the substitution based upon sufficient consideration; and (4) the extinction of the old obligation and the creation of a valid new one. [*In re Dissolution of F Yeager Bridge & Culvert Co*, 150 Mich App 386, 410; 389 NW2d 99 (1986).]

In determining whether a novation occurred, "[t]he question rests in the intention of the parties as it may be gathered from the surrounding facts and circumstances and conduct." *Gorman v Butzel*, 272 Mich 525, 529; 262 NW 302 (1935).

> A recognized test of whether a later agreement between the same parties to an earlier contract constitutes a substituted contract of novation looks to the terms of the second contract; if it contains terms inconsistent with the former contract, so that the two cannot stand together, it exhibits characteristics indicating a substituted contract. [58 Am Jur 2d, Novation, § 5, p 520.]

Similarly, in *Nib Foods, Inc v Mally*, 70 Mich App 553, 560; 246 NW2d 317 (1976), this Court stated:

> We recognize that if parties to a prior agreement enter a subsequent contract which completely covers the same subject, but which contains terms inconsistent with those of the prior agreement, and where the two documents cannot stand together, the later document supercedes and rescinds the earlier agreement, leaving the subsequent contract as the sole agreement of the parties.

Parties to an agreement may execute a substituted agreement that "totally supersedes the terms of the original." *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 412; 646 NW2d 170 (2002) (citation and internal quotation marks omitted). For example, where there is a title insurance commitment and a subsequent title insurance policy, and the latter contains an integration clause, the integration clause evidences an "explicit statement of intent to abrogate the antecedent commitment." *Id*., p 413. In explaining that an integration clause is not a prerequisite for a later contract to supersede an earlier contract, the Court noted, "[I]f the later contract contains the same subject matter as the earlier contract and contains terms that are inconsistent with the terms of the earlier contract, the later contract may supersede the earlier contract, unless it appears that this is not what the parties intended." *Id*., p 414 n 16, citing *Joseph v Rottschafer*, 248 Mich 606, 610-611; 227 NW 784 (1929).

In the present case, the parties' 2001 agreement for the purchase of equipment included certain provisions relating to warranties. When the equipment stopped functioning in 2002, the parties entered into a second agreement concerning the purchase of replacement equipment. The 2002 agreement does not contain terms that are inconsistent with the 2001 agreement. Rather, the 2002 agreement references and incorporates terms relating to the warranty of the original equipment. Specifically, the parties agreed that if the equipment failure was "due to warranty," defendant would refund plaintiff's deposit on the replacement equipment, but if the "failure was due to any conditions not covered by the warranty," plaintiff would pay the balance due. The circuit court erred in determining as a matter of law that the evidence showed that the parties intended to extinguish obligations regarding the original equipment (including the warranties) when they entered into an agreement concerning the purchase of replacement equipment. The 2002 agreement is consistent with an intent to supplement, not supplant, the 2001 agreement. Therefore, we reverse the circuit court's order granting defendant summary disposition on the basis of novation.

Reversed.

/s/ Michael J. Talbot
/s/ Helene N. White
/s/ Kurtis T. Wilder